QB Khidmat Teguh Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-189–05 OF 2016
MOHD NAZLAN JC
8 NOVEMBER 2015

Civil Procedure — Parties — Representative capacity — Whether plaintiff and creditors it represented satisfied requirements to be met to succeed in a representative action — Whether creditors had common interest and common grievance — Whether defendants' opposition justified

Companies and Corporations — Winding up — Creditors' voluntary winding up — Application by creditors for leave to commence proceedings against wound up company and its liquidator — Creditors requested assistance of court to determine propriety of creditors' meeting and purported appointment of liquidator — Whether there was lack of information on background to affairs leading to winding up — Whether creditors manifestly shown that they had a prima facie case of real dispute — Whether creditors' claim could be dealt with in winding up process — Whether voluntary winding up of company had been carried out in accordance with relevant legal provisions — Whether second defendant had been validly appointed as liquidator

When Pembinaan Legenda Unggul Sdn Bhd ('the first defendant') became insolvent and unable to continue its business, the members of the first defendant passed a special resolution to voluntarily wind-up the first defendant and appoint the second defendant as its liquidator for the purposes of winding up its affairs. Consequently, the first defendant was wound up by way of a creditors' voluntary winding up and the second defendant was appointed as its provisional liquidator. On 2 November 2015, the first defendant company held a creditors' meeting ('the creditors' meeting') to lay out the statement of affairs of the company, consider the nomination of the second defendant as the liquidator and to consider the appointment of a Committee of Inspection. The creditors present at the creditors' meeting were concerned about the conduct and outcome of this meeting, namely the absence of the company secretary at the meeting, the alleged lack of explanation by the first defendant as to the background to the affairs leading to the winding up, the disagreement on the appointment of the second defendant as the liquidator and as to whether the creditors' meeting had been lawfully adjourned. Although the creditors claimed that no firm decision had been made at the creditors' meeting as to the appointment of the second defendant as the liquidator, the first defendant

claimed that the adjournment of the creditors' meeting was not valid because the motion for consent to adjourn was not positively worded or in compliance with r 119 of the Companies (Winding-up) Rules 1972 and that in the absence of any nominations made by the creditors on the choice of liquidator, the second defendant had been validly appointed as the liquidator of the first defendant. The first defendant also claimed that the voluntary winding up of the company had been carried out in accordance with the relevant legal provisions. QB Khidmat Teguh Sdn Bhd ('the plaintiff'), a creditor of the first defendant, instituted the present representative action for itself and 28 other creditors of the first defendant, whereby it sought the leave of the court under s 263(2) of the Companies Act 1965 ('the Act') to commence proceedings against the defendants, for relief in the form of directions from the court concerning the winding up of the first defendant and the appointment of the second defendant as liquidator. By way of this application, the plaintiff and other creditors challenged the first defendant's conduct of the creditors' meeting and the purported appointment of the second defendant as the liquidator of the first defendant. The defendants' opposed the plaintiff's application on the grounds that the plaintiff failed to meet the test for a representative action in commencing this proceeding and also because it did not fulfil the requirements to justify leave being granted under s 263(2) of the Act.

Held, allowing the plaintiff's leave application:

(1) The plaintiff and those it represented had satisfied the requirements to be met in order to succeed in a representative action. They were members of a class in that they were a group of unsecured creditors of the first defendant. Their common interest was for the winding up of the first defendant to be properly explained to them and the appointment of the liquidator to be correctly made and their common grievance was the conduct and outcome of the creditors' meeting. The defendants' opposition that was based on the fact that the plaintiff and those it represented were relying on different sources of right as they had all entered into individual and separate contracts with the first defendant, which all contained different terms, had no merit, as the action that the creditors sought to initiate was not in respect of enforcing their rights as creditors to individual contracts with the first defendant. Instead, the creditors were requesting the assistance of the court to determine the propriety of the creditors' meeting including the purported appointment of the second defendant as liquidator. The plaintiff and those it represented had thus shown that the existence of their common interests as the group of unsecured creditors, that they had a common grievance for which they were seeking a common beneficial relief. The defendants' contention on whether this class action was validly constituted was thus unsustainable (see paras 56–64).

(2) The plaintiff's leave application was not premised on any petty or perfunctory basis but on the premise of a lack of information on the background to the affairs leading to the winding up and the legality of the appointment of the liquidator, which was critical to any liquidation process in corporate insolvency. It was also clear that the nature of the plaintiff's claim would not be adequately dealt with in the winding up of the first defendant. There was sufficient evidence of a prima facie claim against the defendants. Although the court would not as a matter of principle ordinarily interfere with the exercise of the duties of a liquidator in his administration of the process of the liquidation, the plaintiff had manifestly shown that it had a prima facie case of real dispute and that the nature of the claim by the plaintiff and those it represented could not be dealt with in the winding up process (see paras 71–73, 76 & 134–135).

(3) A creditors' meeting could practically only properly proceed and achieve its objectives of informing the creditors of the matters requiring disclosure if the first defendant, as the company being liquidated, and the second defendant, being the provisional liquidator, played their part in ensuring full observance of the relevant statutory requirements. However, in the present case, the first defendant had failed to ensure that the company secretary attended the creditors' meeting, failed to properly lay down the full statement of the company's affairs and to properly disclose to the meeting the company's affairs and circumstances leading up to the proposed winding up (see paras 90–93).

(4) The plaintiff and its representatives' core challenge was a most fundamental one, which was on the validity of the appointment of the second defendant as liquidator arising from the creditors' meeting. Under s 261(1) and (2) of the Act the creditors were granted the power of selecting the liquidator for the purpose of winding up the affairs of the company at the creditors' meeting. In the instant case the creditors had voiced their concerns about the second defendant at the creditors' meeting and were ready to make a nomination at the adjourned meeting which did not officially take place. In the circumstances, the stance taken by the defendants that in the absence of any nominations made by the creditors on the choice of liquidator, the second defendant had been validly appointed as the liquidator of the first defendant, had no merit. Further, the balance of convenience lay overwhelmingly in favour of the plaintiff to pursue its claim against the defendants for the necessary directions on the appointment of the liquidator and the affairs concerning the winding up of the first defendant (see paras 94–98, 100, 104, 116 & 131–133).

[Bahasa Malaysia summary

Apabila Pembinaan Legenda Unggul Sdn Bhd ('defendan pertama') menjadi tidak solven dan tidak dapat meneruskan perniagaannya, anggota-anggota

defendan pertama telah meluluskan resolusi khas untuk menggulung secara sukarela defendan pertama dan melantik defendan kedua sebagai pelikuidasinya bagi tujuan menggulung urusannya. Berikutan itu, defendan pertama telah digulung melalui penggulungan pemiutang secara sukarela dan defendan kedua telah dilantik sebagai pelikuidasi sementara. Pada 2 November 2015, syarikat defendan pertama telah mengadakan mesyuarat pemiutang ('mesyuarat pemiutang') untuk membentangkan penyata urusan syarikat, mempertimbangkan pencalonan defendan kedua sebagai pelikuidasi dan untuk mempertimbangkan pelantikan Jawatankuasa Siasatan. Pemiutang-pemiutang hadir di mesyuarat pemiutang khuatir tentang pengendalian dan keputusan mesyuarat ini, iaitu ketidakhadiran setiausaha syarikat di mesyuarat itu, penjelasan yang dikatakan kurang oleh defendan pertama berhubung latar belakang urusan yang membawa kepada penggulungan itu, perbezaan pendapat berhubung pelantikan defendan kedua sebagai pelikuidasi dan berhubung sama ada mesyuarat pemiutang telah ditangguhkan dengan sah. Walaupun pemiutang mendakwa bahawa tiada keputusan kukuh telah dibuat di mesyuarat pemiutang itu berhubung pelantikan defendan kedua sebagai pelikuidasi, defendan pertama mendakwa bahawa penangguhan mesyuarat pemiutang itu tidak sah kerana usul untuk persetujuan untuk penangguhan itu tidak dinyatakan dengan jelas atau mematuhi k 119 Kaedah-Kaedah (Penggulungan) Syarikat 1972 dan bahawa dengan ketidakhadiran mana-mana pencalonan yang dibuat oleh pemiutang-pemiutang berhubug pilihan pelikuidasi, defendan kedua dengan sah telah dilantik sebagai pelikuidasi defendan pertama. Defendan pertama juga mendakwa bahwa penggulungan sukarela syarikat tersebut telah dijalankan menurut peruntukan perundangan yang berkaitan. QB Khidmat Teguh Sdn Bhd ('plaintif'), pemiutang defendan pertama, telah memulakan tindakan representasi ini untuk dirinya dan 28 pemiutang defendan pertama yang lain, di mana ia memohon kebenaran mahkamah di bawah s 263(2) Akta Syarikat 1965 ('Akta tersebut') untuk memulakan prosiding terhadap defendan-defendan, untuk relief dalam bentuk arahan daripada mahkamah berkenaan penggulungan defendan pertama dan pelantikan defendan kedua sebagai pelikuidasi. Melalui permohonan ini, plaintif dan pemiutang lain telah mencabar pengendalian mesyuarat pemiutang oleh defendan pertama dan bagi maksud pelantikan defendan kedua sebagai pelikuidasi defendan pertama. Defendan-defendan telah membantah permohonan plaintif atas alasan bahawa plaintif telah gagal memenuhi ujian untuk tindakan representasi bagi memulakan prosiding ini dan juga kerana ia tidak memenuhi keperluan mewajarkan kebenaran yang diberikan di bawah s 263(2) Akta tersebut.

Diputuskan, membenaran permohonan kebenaran plaintif:

(1) Plaintif dan pihak yang diwakili mereka telah memenuhi keperluan untuk berjaya dalam tindakan representasi. Mereka adalah anggota satu kelas di mana mereka adalah sekumpulan pemiutang tidak bercagar

defendan pertama. Kepentingan bersama mereka adalah untuk penggulungan defendan pertama diperjelaskan sewajarnya kepada mereka dan pelantikan pelikuidasi dibuat dengan betul dan kilanan bersama mereka adalah disebabkan pengendalian dan keputusan mesyuarat pemiutang itu. Bantahan defendan-defendan yang berdasarkan fakta bahawa plaintif dan mereka yang diwakilinya bergantung kepada sumber berbeza untuk hak kerana mereka semua telah memasuki kontrak individidu dan berasingan dengan defendan pertama, di mana kesemuanya mengandungi terma-terma berbeza, tidak mempunyai merit, kerana tindakan yang ingin dimulakan oleh pemiutang bukan berkaitan menguatkuasakan hak mereka sebagai pemiutang-pemiutang kepada kontrak-kontrak individu dengan defendan pertama. Sebaliknya, pemiutang-pemiutang itu memohon bantuan mahkamah menentukan kewajaran mesyuarat pemiutang termasuklah pelantikan defendan kedua yang dikatakan sebagai pelikuidasi. Plaintif dan mereka yang diwakilinya dengan itu telah menunjukkan bahawa terdapat kepentingan bersama mereka sebagai sekumpulan pemiutang yang tidak bercagar, bahawa mereka mempunyai kilanan bersama yang mana mereka memohon relief benefisiari bersama. Hujah defendan-defendan berhubung sama ada kelas ini telah dibentuk secara sah dengan itu tidak boleh dikekalkan (lihat perenggan 56–64).

(2) Permohonan kebenaran plaintif tidak berlandaskan apa-apa asas yang remeh-temeh atau acuh tak acuh tetapi berlandaskan kekurangan maklumat berhubung latar belakang berhubung urusan yang membawa kepada penggulungan itu dan kesahan pelantikan pelikuidasi, yang mana adalah kritikal kepada mana-mana proses pembubaran dalam insolvensi korporat. Ia juga jelas bahawa jenis tuntutan plaintif tidak boleh dikendalikan sewajarnya dalam penggulungan defendan pertama. Terdapat keterangan mencukupi suatu tuntutan prima facie terhadap defendan-defendan. Walaupun mahkamah biasanya tidak akan campur tangan dengan amalan kewajipan pelikuidasi dalam pentadbirannya berhubung proses pembubaran, plaintif dengan nyata telah menunjukkan bahawa ia mempunyai kes prima facie berhubung pertikaian sebenar dan bahawa jenis tuntutan oleh plaintif dan mereka yang diwakilinya tidak boleh dikendalikan dalam proses penggulungan (lihat perenggan 71–73, 76 & 134–135).

(3) Mesyuarat pemiutang boleh secara praktikal hanya wajar dimulakan dan mencapai objektifnya memberitahu pemiutang-pemiutang tentang perkara-perkara yang memerkulan penzahiran jika defendan pertama, sebagai syarikat yang sedang dibubarkan, dan defendan kedua, sebagai pelikuidasi sementara, memainkan peranan mereka dalam memastikan penelitian penuh terhadap keperluan statutori yang relevan. Walau bagaimanapun, dalam kes ini, defendan pertama telah gagal memastikan setiausaha syarikat menghadiri mesyuarat pemiutang itu, gagal

membentangkan sewajarnya penyata penuh urusan syarikat dan untuk mendedahkan sewajarnya kepada mesyuarat itu urusan syarikat dan keadaan yang membawa kepada penggulungan yang dicadangkan itu (lihat perenggan 90–93).

(4) Plaintif dan cabaran teras representasinya adalah suatu yang penting, yang mana adalah berhubung pengesahan pelantikan defendan kedua sebagai pelikuidasi yang timbul daripada mesyuarat pemiutang. Di bawah s 261(1) dan (2) Akta tersebut pemiutang-pemiutang diberikan kuasa memilih pelikuidasi bagi tujuan menggulung urusan syarikat di mesyuarat pemiutang. Dalam kes ini pemiutang-pemiutang telah mengutarakan kebimbangan mereka tentang defendan kedua di mesyuarat pemiutang itu dan telah bersedia untuk membuat pencalonan di mesyuarat yang ditangguhkan yang mana tidak secara rasmi berlaku. Dalam keadaan itu, pendekatan yang diambil oleh defendan-defendan bahawa dalam ketidakhadiran mana-mana pencalonan yang dibuat oleh pemiutang-pemiutang berdasarkan pilihan pelikuidasi, defendan kedua telah sah dilantik sebagai pelikuidasi defendan pertama, tidak mempunyai merit. Selanjutnya, imbangan kesesuaian terletak menyebelahi plaintif untuk meneruskan tuntutannya terhadap defendan-defendan untuk arahan yang perlu berhubung pelantikan pelikuidasi dan urusan berkenaan penggulungan defendan pertama (lihat perenggan 94–98, 100, 104, 116 & 131–133).]

Notes

For cases on creditors' voluntary winding up, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1318–1320.

For cases on representative capacity, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 6707–6708.

Cases referred to

Capita Financial Group Ltd v Rothwells Ltd (1989) 15 ACLR 348, SC (refd)

Centrebind Ltd, Re [1966] 3 All ER 889; [1967] 1 WLR 377, Ch D (refd)

Duke of Bedford v Ellis and others [1900-03] All ER Rep 694; [1901] AC 1, HL (refd)

JJ Leonard Properties Pty Ltd v Leonard (WA) Pty Ltd (in liq) (1986) 11 ACLR 224, SC (refd)

Kyra Nominees Pty Ltd, Re (1980) 5 ACLR 60, SC (refd)

Markt and Co Limited v The Knight Steamships Company Limited; Sale and Frazar Limited v The Knight Steamships Company Limited [1908-10] All ER Rep Ext 1031; [1910] 2 KB 1021, CA (distd)

Mesuntung Property Sdn Bhd v Kimlin Housing Development Sdn Bhd [2014] 4 MLJ 886, CA (refd)

Mosbert Berhad (In Liquidation) v Stella D'Cruz [1985] 2 MLJ 446, SC (refd)

National Safety Council of Australia, Victorian Division, Re [1990] VR 29, SC (refd)
Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd & Ors [1988] 2 MLJ 624 (refd)
Palmer Marine Surveys Ltd, Re [1986] BCLC 106; [1986] 1 WLR 573, Ch D (folld)
Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd [2005] MLJU 571; [2005] 8 CLJ 652, HC (refd)
Watta Battery Industries Sdn Bhd v Uni-Batt Manufacturing Sdn Bhd (Chow Siew Hon & Ors, interveners) [1993] 1 MLJ 149; [1993] 1 AMR 344, HC (refd)

Legislation referred to

Companies Act 1965 ss 226(3), 254(1)(b), 255(1), (3), 257, 258, 260, 260(1), (2), (3), (4), (4)(a), (5), (6), (9), 261, 261(1), (2), 263(2), 266
Companies Act 1961 [AU] s 258, 261
Companies (Winding-Up) Rules 1972 rr 119, 122, 194, 194(1) 261, Forms 17, 70
Insolvency Act 1986 [UK]
Rules of Court 2012 O 15 r 12, 12(1)

SK Liow (Jennifer Lai and CY Leong with him) (Liow & Co) for the plaintiff. HY Chong (Wilson Ho with him) (Azman Davidson & Co) for the defendant.

Mohd Nazlan JC:

INTRODUCTION

[1] This is an application for leave of court under s 263(2) of the Companies Act 1965 for action be commenced by the plaintiff against the first defendant, a company which has been voluntarily wound up, and the second defendant as its liquidator.

[2] I allowed the application at the conclusion of the hearing. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

[3] On 2 November 2015, the first defendant was wound up by way of a creditors' voluntary winding up pursuant to s 254(1)(b) of the Companies Act 1965 ('the CA') and the second defendant was said to have been appointed as its liquidator.

[4] The first defendant asserted that it was a loss making entity and due to

this, its shareholder owner, Encorp Construction and Infrastructure Sdn Bhd ('ECISB') carried out a rationalisation and restructuring exercise whereby the first defendant was taken out from the Encorp Group. Following this exercise, ECISB's share in the first defendant were disposed to Senandung Serbajuta Sdn Bhd on 3 September 2015 and was subsequently put into winding up. This exercise and disposal was announced by Encorp Bhd to Bursa Malaysia.

[5] Following the said exercise, the winding up process of the first defendant was commenced whereby the directors of the first defendant passed a resolution dated 8 October 2015 pursuant to article 98 of the first defendant's articles of association and resolved that the first defendant cannot by reason of its liabilities continue its business and that accordingly the first defendant should be wound up voluntarily and the second defendant be appointed as a provisional liquidator for the purposes of winding up the affairs of the first defendant.

[6] The directors then summoned a meeting of the company and a meeting of the creditors pursuant to s 255(1) of the CA with the requisite notification under s 260(2) and (3) on the meeting of the creditors. The first meeting of the creditors was held on 2 November 2016 ('the first creditors' meeting'). The meeting of the members of the company was also held earlier on the same day. The defendants thus argued that the voluntary winding up of the first defendant was carried out in accordance with the relevant legal provisions. The plaintiff together with the creditors represented at the first creditors' meeting had all filed their proofs of debt with the liquidator.

[7] The plaintiff on the other hand argued that there was material change in the first defendant's corporate structure, including its shareholding and management matrix immediately prior to its voluntary winding up, including the change of name. The plaintiff found it remarkable that all of these changes happened within the short period around September 2015 up to its voluntary winding up in November 2015 — within two months which, it is said, clearly demonstrated a telltale sign that the first defendant had the ulterior motive to, among others, avoid any mandatory statutory disclosure and/or the stigma of 'winding up' from the Encorp Group, held under a public listed company then.

[8] The plaintiff alleged that the first defendant had preplanned for its creditors' voluntary winding up, to conceivably avoid the debts of the first defendant's creditors. The documented chronology would also reveal that the first defendant tried very hard to push through the agenda of the creditors' voluntary winding up vis a vis the first creditors' meeting that was organised by the first defendant shortly after the first defendant had passed the resolution among its members for the creditors' voluntary winding up. The circumstances leading to the winding up were, according to the plaintiff, rather suspicious to

allow the second defendant to seamlessly 'take charge' of the affairs of the company subsequent to its winding up.

[9] Then, there is also the complaint that the defendants had intentionally disregarded the wishes of the creditors to consider appointing an alternative liquidator to the second defendant who was the appointed provisional liquidator by the first defendant. Actual notice was given to the defendants during the first creditors' meeting that the creditors would like to adjourn the agenda on the appointment of the liquidator during the first creditors' meeting. In fact, subsequently, one Mr Jason Tan from Inovar Contracts Sdn Bhd (being one of the creditors who attended and were represented in this class action) specifically wrote to the second defendant to put on record of his intention to propose an alternative liquidator for the purpose of the winding up of the first defendant.

[10] But this was argued to have been of no consequence as the adjournment of the first creditors' meeting was deemed by the defendants to be invalid since the motion proposed by the chairman of the first creditors' meeting was 'not positively worded'. Corollary to that, the second defendant claimed that by default, the second defendant had become the liquidator of the first defendant under s 261 of the CA since technically there was no nomination made by the creditors at the first creditors' meeting of their choice as liquidator.

[11] The chairman of the first creditors' meeting disagreed and replied to the first defendant's letter dated 12 November 2015 through his email on 14 November 2015 emphasising that the adjournment of the first creditors' meeting was done properly and in accordance of the law, given that the motion was straightforward and created no ambiguity or prejudice or any kind prior to the creditors present casted their votes at the material time. In any event, the alleged irregularity could be cured pursuant to r 194(1) of the Companies (Winding Up) Rules 1972, since there was no injustice whatsoever that was caused by the adjournment.

[12] At the date appointed for the adjourned creditors' meeting, the hall at the venue of the meeting was available despite the second defendant in his letter of 12 November 2015 stating otherwise, but no arrangement whatsoever had been made to accommodate the proceedings. Neither AHA, nor the company secretary nor the second defendant was present. The creditors who attended, about 54 registered, managed to get a meeting room for the meeting.

[13] Following discussions, the meeting agreed that given the position taken by the defendants on the appointment of the second defendant as the liquidator, and the potentially unnecessary scenario that would arise if another person was appointed by the creditors as liquidator, the remaining two items —

on the nomination of the liquidator and the committee of inspection, which were supposed to have been considered at this adjourned meeting, not be pursued. The adjourned creditors' meeting therefore formally did not take place. Instead the creditors present decided to initiate court action to seek the necessary directions from the court on the winding up and on the appointment of liquidator of the first defendant. Hence the instant leave application.

EVALUATION AND FINDINGS OF THIS COURT

[14] I will next examine the issues raised by the plaintiff in its dissatisfaction against the first creditors' meeting, as well as on the appointment of the second defendant as the liquidator. The arguments proffered by the defendants in reply thereto would similarly be scrutinised, before I state my findings on each of these issues, and consider the key question whether these issues, if found to be valid, would be sufficient justification for this court to grant leave to the plaintiff pursuant to s 263(2) of the CA.

[15] At its core, the plaintiff, who represents 28 creditors (inclusive of the plaintiff) of the first defendant, are challenging the defendants' conduct of the first creditors' meeting and the purported appointment of the second defendant as the liquidator of the first defendant. The plaintiff seeks leave of court under s 263(2) of the CA to commence proceedings against the first defendant and the second defendant for relief in the form of directions of the court concerning the affairs of the winding up of the first defendant and the appointment of the second defendant as liquidator.

[16] It is common ground that the requisite notice of the meeting of the creditors to be held on 2 November 2015 was duly issued under s 260 of the CA. The notice specified that a meeting of the members of the first defendant was also to take place on the same day, to consider firstly, the special resolution seeking the voluntary winding up of the company, and secondly the ordinary resolution for the appointment of the second defendant as the liquidator of the first defendant company. That was for the meeting of the members.

[17] The purpose of the creditors meeting is stated in the notice to be firstly, to lay out the statement of affairs of the company; secondly, to consider the nomination of a person to be the liquidator, if thought fit; and thirdly, to consider the appointment of a committee of inspection and where desired to appoint members of that committee, if thought fit. These are standard items usually considered at a creditors' meeting in a voluntary winding up.

[18] The dispute and complaints were primarily on matters which transpired at the first creditors' meeting. I think it is fair to categorise them into three parts. The first concerns the absence of the company secretary; the second

is on the alleged lack of or unsatisfactory explanation by the first defendant on the affairs of the company; and thirdly, which is also in my view most critically, on whether the first creditors' meeting was lawfully adjourned, for this has direct implication on the status of the second defendant as the liquidator of the first defendant.

ABSENCE OF COMPANY SECRETARY

[19] The first creditors' meeting was initially presided by one En Azahar Hollis bin Abdullah ('AHA') who represented himself as a director of the first defendant. With AHA at the podium were the second defendant, being the provisional liquidator, and Mr Wilson Ho, an advocate and solicitor, being the legal adviser to the first defendant. AHA informed the meeting that following the decision of the board of directors of the first defendant on 8 October 2015 that the company could no longer continue its business given its insolvency, steps had been pursued to seek the voluntary winding up of the first defendant. It was further informed that the members' meeting held earlier on the same day had passed the special resolution to wind up the company by way of a creditors' voluntary winding up under s 254(1)(b) of the CA, and that pursuant to s 261(1) of the CA, for the second defendant be nominated as liquidator for such purpose.

[20] One Mr Albert Tang Yew Liong ('AT'), representing a creditor, then queried whether the company secretary of the first defendant was present, citing the requirement of s 260(5) of the CA which clearly provides as follows:

> (5) The director so appointed and the secretary shall attend the meeting and disclose to the meeting the company's affairs and the circumstances leading up to the proposed winding up.

[21] This was answered by the second defendant in the negative. AHA then proceeded to inform the creditors of their right to appoint one representative of the creditors to chair the meeting under s 260(6) of the CA. AT was duly elected, who upon a reminder by the second defendant, again asked whether the company secretary was present, to which one 'Ms Cindy' came forward and claimed to be a staff of the company secretary. A voting was then conducted to determine whether the meeting should continue in the absence of the company secretary. The result was inconclusive since only a majority in value but not a majority in number were in favour of the continuation of the meeting. However, given the appearance of Ms Cindy, AT, as the chairman, announced that the first creditors' meeting would proceed.

[22] It is also observed that Ms Lee Lay Hong, the company secretary of the first defendant who had been in office since 2009 and who must surely personally had sufficient knowledge on the winding up, had resigned on

3 September 2015 following the change of management of the first defendant company. But it was averred by the plaintiff that it was later discovered from SSM search and the draft minutes of the first creditors' meeting (prepared by Ms Cindy, representing the first defendant) that the former secretary was actually present during the first creditors' meeting and even participated in the subsequent agenda item on the proposal of nominees for the appointment of the committee of inspection.

[23] Whilst the undisputed fact is that Ms Lee Lay Hong was no longer the secretary at the material time, the newly appointed company secretary of the first defendant on 3 September 2015 (just prior to the first defendant's directors' resolution on the voluntary winding up of the first defendant on 8 October 2015), one Ms Kua Swee Tieng was clearly absent during the first creditors' meeting and there has been no subsequent confirmation, despite the written request by AT as the chairman of the first creditors' meeting no less, whether the representation made by the defendants, that Ms Cindy (whose name appeared a few times in the meeting script prepared in advance by the defendants for the chairman of the meeting) was truthfully indeed the staff of the company secretary for the first creditors' meeting.

[24] Thus the present company secretary who should have been present at the first creditors' meeting failed to attend, in non-compliance with the plain statutory requirement of s 260(5). No explanation for her absence was given, before, during or after the first creditors' meeting. At the same time, the former company secretary who would have the background information but only just resigned, did in fact attend and participate in the first creditors' meeting. Yet despite the possibility of her assisting on the presentation to the creditors of the background information leading to the winding up, her presence was not disclosed by the defendants to the meeting.

[25] Although AT as the chair decided to continue with the meeting, such decision was made following voting, and on the understanding that Ms Cindy could assist in the minute taking given her representation. On the whole the entire episode arising from the unexplained absence of the present company secretary not only involved statutory non-compliance, but also reflected an unsatisfactory conduct on the part of the defendants who ought to have been more candid, prepared and upfront about the absence of the company secretary.

THE STATEMENT OF AFFAIRS

[26] The responsibility of the first defendant in ensuring a full disclosure of the statement of affairs of the company is manifest from the clear language of s 260(4) and (5) as follows:

(4) The directors of the company shall —

(a) cause a full statement of the company's affairs showing in respect of assets the method and manner in which the valuation of the assets was arrived at, together with a list of the creditors and the estimated amount of their claims to be laid before the meeting of creditors; and

(b) appoint one of their number to attend the meeting.

(5) The director so appointed and the secretary shall attend the meeting and disclose to the meeting the company's affairs and the circumstances leading up to the proposed winding up.

[27] It is the requirement of s 260(4)(a) of the CA that a full statement of affairs of the first defendant be laid before the meeting of the creditors. When asked by creditors for a copy, an unsigned copy was extended to AT as the chair by the second defendant, but not to the others. The requirements in s 260(4)(a) are specific in stipulating that in the disclosure of the assets, the method and manner in which the valuation of the assets was arrived at, must also be explained. This was absent from the statement of affairs which was only given to the creditors several weeks after the first creditors meeting.

[28] Further, s 260(5) requires the director appointed by the company to attend the meeting (as well as the company secretary, as mentioned earlier) to disclose to the meeting the company's affairs and the circumstances leading up to the proposed winding up. However, the presentation on the statement of affairs was done by a staff of the firm of the second defendant. When asked by the chairman whether he could explain the circumstances leading to the winding up of the first defendant, the person replied in the negative.

[29] The same question was posed to AHA as the appointed director of the first defendant, who stated the obvious and answered that the reason for the winding up was the insolvency of the company. AHA also maintained that it was a commercial decision on the part of the new owner (of which he is a representative) of the first defendant to have bought the first defendant, an insolvent company with about RM100m in liabilities, only to have it liquidated almost immediately thereafter.

[30] AHA was in fact only newly appointed as director on 3 September 2015, less than two months before the first creditors' meeting. Whilst this does not necessarily mean that he could not prepare himself for the meeting, especially about the background that led to the winding up, given his relatively short tenure, the affidavit evidence of the plaintiff suggested quite clearly the responses by the director so appointed for the first creditors' meeting did not endear to the creditors. For instance, as the question, in my view perfectly legitimate as well as indeed would only reasonably to be expected 'Why would

one buy a company knowing that it was insolvent?' AHA answered simply by saying that it was 'a commercial decision'.

[31] In my view, merely because the statement of affairs under s 260(4) and the background information leading to the winding up under s 260(5) are only to be apprised by the first defendant to the creditors, and not tabled or clarified for their approval does not permit a company subject to the winding up not to strictly adhere to the letter of the law.

[32] It is on the contrary absolutely imperative that a company subject to a creditors' voluntary winding up demonstrate the highest level of adherence to the requirements of s 260(4) and (5) in order to give full and truly meaningful effect to the same. In the instant case, the affidavits affirmed by three representatives of the creditors, for the plaintiff were clear in stating that the creditors were generally concerned with the responses from the first defendant, as they feared that the entire transaction was a scheme to liquidate the first defendant at the expense of the creditors. There was thus basis to question the extent of the compliance by the first defendant with the requirements of s 260(4) and (5) of the CA.

LIQUIDATOR APPOINTMENT AND MEETING ADJOURNMENT

[33] Given such sentiment amongst the creditors, it was no surprise that when the meeting considered the next item — on the nomination of the liquidator, after AT, as the chairman explained that under s 261 of the CA both the first defendant and the creditors could nominate any qualified person as liquidator but that if the nominations are different, the one nominated by the creditors would be appointed (and if the creditors do not nominate, the one nominated by the company would instead be appointed), Mr Jason Tan from Inovar Contracts Sdn Bhd stated he was not comfortable with the second liquidator being appointed liquidator and asked for time to explore other names, and suggested that the item on the appointment of liquidator be deferred to another date. As this was seconded by another creditor, AT, as the chairman of the meeting decided to defer the item, and next considered the last item on the agenda which was on the appointment of the committee of inspection.

[34] There was a protracted discussion amongst the creditors as to which amongst them ought to make up the five member committee of inspection. The bone of contention was whether nominees related to the Encorp Group (hence linked to the previous owner; thus presumably deemed friendly to the new owner who now seeks to liquidate the first defendant) should be given two or three seats. As this proved inconclusive voting then seemed imminent. But by then it was already 2.30pm (with no lunch or refreshment provided by the

first defendant) and this prompted AT as the chairman of the first creditors' meeting asking those who were against adjourning the creditors' meeting to put up their hands.

[35] The five persons representing five creditors said to be related to the Encorp Group raised their hands. AT took the view that this objection did not represent a majority in number (a mere five out of about 70 who attended) or in value (based on the earlier counting on the continuation of meeting in the absence of company secretary, where the total value represented by creditors present was about RM71m, whilst the five represented about RM34.6m), and as it was no longer conducive to continue, coupled with the view that no prejudice would be occasioned to the general body of shareholders, the meeting was adjourned to 16 November 2015 at the same time and venue. I think it is significant to note that neither AHA, as the director appointed by the first defendant for the first creditors' meeting, nor the second defendant, nor the legal adviser then raised any issue, let alone objected to the adjournment of the first creditors' meeting.

[36] Post the first creditors' meeting, AT on 4 November 2015 prepared and sent the requisite Form 70 pursuant to r 122 of the Companies (Winding-Up) Rules 1972 on the memorandum of adjournment of creditors meeting to AHA, the company secretary and the second defendant as the provisional liquidator. AT had also as stated earlier, separately on even date by email asked for confirmation on the status of Ms Cindy and for the draft minutes of the meeting.

[37] Separately, Mr Jason Tan on behalf of Inovar Contracts Sdn Bhd, who, at the meeting expressed the request for time for the creditors to nominate a liquidator, followed up with his request by writing a letter dated 5 November 2015 to the second defendant to affirm that Inovar Contracts Sdn Bhd which he represents would be proposing an alternative liquidator for nomination at the adjourned meeting on 16 November 2015.

[38] However, in a reply letter to AT from the first defendant dated 12 November 2015 signed by the second defendant as the liquidator, and the defendants made two statements of importance. Firstly, the defendants claimed that the adjournment of the first creditors' meeting as declared by AT was not valid because the motion for consent to adjourn should have been positively worded and not based on who were against the same, and also because only a vote carried by poll could have determined whether the majority in number and value had been achieved, in accordance with r 119 of the Companies (Winding-Up) Rules 1972.

[39] Secondly, in the absence of any nomination made by the creditors on

their choice of liquidator at that first creditors' meeting on 2 November 2015, the second defendant, being the one nominated by the first defendant via its members' resolution dated 2 November 2015, had been validly appointed as the liquidator of the first defendant (another letter of even date from the second defendant to the same effect was also delivered to Inovar Contracts Sdn Bhd).

[40] The chairman of the first creditors' meeting, AT, disagreed with this stance taken by the defendants, emphasising in his reply email of 14 November 2015 that the decision on the nomination of a liquidator had clearly been deferred since the creditors required more time, and that it was permissible for the motion for adjournment be worded in negative form to facilitate decision making. In any event r 194(1) of the Companies (Winding-Up) Rules 1972 could be invoked to cure any irregularity in the absence of any injustice.

[41] The thrust of the defendants' opposition to this application is therefore twofold. First, they argue that the plaintiff filed to meet the test for a representative action in commencing this proceeding, and secondly it also did not fulfil the requirements to justify leave be granted under s 263(2) of the CA. I will deal with each of these in my further evaluation of the various issues hereinunder. But first, the law.

THE LAW

[42] This application, which relates to companies which have been voluntarily wound up is premised on s 263(2) of the CA. It reads thus:

> (2) After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

[43] I see no basis not to follow the jurisprudence of s 226(3) concerning leave request to commence proceedings against companies wound up by the court when examining leave application under s 263(2). After all the two provisions are almost identical. Section 226(3) states thus:

> Actions stayed on winding up order
>
> (3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except —
>
> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.

[44] The rationale for s 226(3) is well stated by Seah SCJ for the Supreme Court in *Mosbert Berhad (In Liquidation) v Stella D'Cruz* [1985] 2 MLJ 446 in

the following terms:

> But in our opinion, this practice of the court should be adopted and followed for these reasons, viz, it cannot be disputed that the primary object of winding up is the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts. And the purpose of the statutory provision is to ensure that all claims against the company in liquidation which can be determined by the cheap and summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company.

[45] It is well established therefore that the statutory provision is designed to empower the court to interfere with actions and proceedings with the view not to in any manner impeding third party rights, but entirely to preserving the already limited assets of the wound up company for distribution amongst those who may have claims on the same.

[46] The Supreme Court in *Mosbert Berhad* had also held what is now a fundamental principle governing leave application to commence proceedings that the court will generally grant leave to the applicant if his claim cannot be adequately dealt with in the winding up or that the remedy he seeks cannot be given in a winding up proceedings.

[47] More recently, the Court of Appeal had reaffirmed the position in law on the test to be applied under s 226(3) of the CA in the case of *Mesuntung Property Sdn Bhd v Kimlin Housing Development Sdn Bhd* [2014] 4 MLJ 886, as follows:

> From the above authorities, the appellant has the burden of satisfying the court of two criteria:
>
> (a) the appellant's claim cannot be adequately dealt with by the winding up court; and
>
> (b) the appellant has a prima facie case against the respondent.

[48] Thus, an applicant for leave must also satisfy the court that he has a prima facie case to pursue the claim. *Mesuntung Property* and authorities such as *Capita Financial Group Ltd v Rothwells Ltd* (1989) 15 ACLR 348 have established that the requirement of prima facie may be fulfilled if it is shown that there is a real or serious dispute between the parties which would warrant a trial to determine the truth of the opposing contentions.

A WHETHER THE PLAINTIFFS FULFIL TEST FOR CLASS ACTION

[49] The defendants contend that the plaintiff did not show that there is a common interest and a common grievance among the plaintiff and the other 27 creditors. The plaintiff and the other 27 creditors are relying on different sources of right as they all have entered into individual and separate contracts with the first defendant where the terms may differ according to the nature of each of their respective contracts with the first defendant.

[50] It is further submitted by the defendants that neither is the remedy sought by the plaintiff under the class action beneficial to all of the class members because the circumstances of each of the individual and separate contracts entered between the creditors and the first defendant would have different implications in terms of the respective claim and defence.

[51] In particular, the defendants refer to the House of Lords decision in *Duke of Bedford v Ellis and others* [1900-03] All ER Rep 694; [1901] AC 1 that established the test that a class action must show that first, the plaintiff and the others represented by him are members of a class and they have a common interest; secondly, they have a common grievance and thirdly the nature of the relief being sought is beneficial to all. This was also followed in *Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd & Ors* [1988] 2 MLJ 624.

[52] The defendants also referred to an English Court of Appeal case of *Markt and Co Limited v The Knight Steamships Company Limited; Sale and Frazar Limited v The Knight Steamships Company Limited* [1908-10] All ER Rep Ext 1031; [1910] 2 KB 1021 which held that the plaintiffs' claim for damages for the loss of their goods shipped on the ship of the defendants failed the test for representative action because there was no common interest or common grievance since the terms of the contracts entered into by the individual plaintiffs could be different, as they were based on separate contracts.

[53] Since the separate contracts entered into by the plaintiff and the 27 creditors, it could be safely assumed, contain different terms, the requirement of common interest and common origin could similarly not be fulfilled in the instant case. As a corollary, the remedy sought would also not be beneficial to all because the separate contracts would have different effects on the respective individual claim and defence.

[54] The plaintiff on the other hand, contends that the plaintiff and the 27 creditors had common interest in the form of their respective debt claims against the first defendant; have the common grievance in respect of the winding up and purported appointment of the second defendant as the

liquidator; and that the relief sought in terms the directions from the court on the winding up and the due appointment of liquidator of the first defendant would be beneficial to all in the class action.

[55] In my evaluation, the starting point is O 15 r 12 of the Rules of Court 2012 ('the ROC') which governs representative proceedings where r 12(1) states:

> (1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun and, unless the Court otherwise orders, continued by or against any one or more of them as representing all or as representing all except one or more of them.

[56] Although all that this rule requires is the existence of 'the same interest', it is well established, that the test enunciated in *Duke of Bedford v Ellis* is equally applicable in local jurisprudence on representative action as decided by the High Court in *Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd & Ors v Sakapp Commodities (M) Sdn Bhd* to the following effect:

> The question that arises here is 'what are the requirements to be satisfied by the plaintiff in order to succeed in a representative action?' In *Duke of Bedford v Ellis and others* [1900-03] All ER Rep 694; [1901] AC 1, Lord Macnaghten said, 'given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent'. In *Smith and Others v Cardiff Corporation* [1953] 2 All ER 1373; [1954] 1 QB 210, the Court of Appeal held that to bring a representative action it must be shown: first, that all the members of the class had a common interest; secondly, that they all had a common grievance; and thirdly, that the relief was in its nature beneficial to them all.
>
> It is clear from *Duke of Bedford*'s case and *Smith*'s case that the plaintiff has to satisfy three requirements in order to succeed in a representative action. Firstly, the plaintiff and those represented by it are members of a class and that these members have a common interest. Secondly, the plaintiff and those it represents have a common grievance. Thirdly, the relief sought is in its nature beneficial to them all.

[57] I find that the plaintiff and the 27 other creditors to have met these requirements. They are members of a class in that they are a group of unsecured creditors of the first defendant. Their common interest is for the winding up of the first defendant to have been properly explained to them and the appointment of liquidator be correctly made, and their common grievance is that these were not the case, and a dispute thus now exists between them and the defendants, on the conduct and outcome of the first creditors' meeting of 2 November 2015. Given such common grievance, the directions from the court on the winding up and on the appointment of liquidator would accordingly be a form of relief beneficial to all unsecured creditors.

[58] I do not think the focus of the defendants' objection being on the fact of separate and individual contracts entered into by the 28 creditors to be a material consideration in ascertaining the existence of a common interest or grievance in the context of the instant application. It is true that at its core, the creditors are surely, as would any creditor expect repayment of debt, claiming for the recovery of the debts owing by the first defendant to them, and I think it safe to assume that their individual contracts with the first defendant may well contain different terms.

[59] But the action that the creditors seek to commence, for which leave of the court is now necessary, is to seek directions of the court in respect of the matters transpired at the first creditors' meeting, particularly in respect of the status of the second defendant as the liquidator as an outcome of the meeting. The action that the creditors seek to initiate is not in respect of enforcing their rights as creditors to actually recover the debts under what are admittedly separate and individual contracts with the first defendant. If leave is granted, they would request the assistance of the court to determine the propriety of the conduct of the said meeting by the defendants.

[60] In other words, the creditors are demanding what in effect is the strict compliance with the law on the conduct of the creditors' meeting including the purported appointment of the second defendant as the liquidator. This, in my view, does not extend to any request for a determination by the court on the validity of the individual claims of debts by the creditors against the first defendant under their respective contracts. Indeed, nor would that be proper.

[61] Thus, for example, in the event the creditors succeed in getting their nominee appointed as the liquidator, the liquidator would then assess their individual claims as part of the liquidation process. The creditors are not relying on the terms of their individual contract in applying for leave or in the substantive action they seek to commence. The source of their common interest is their status as unsecured creditors, pure and simple. To the extent that such status depends on the existence of contract that each of them had executed with the first defendant is not disputed.

[62] But the point is, in the action sought to be commenced by the creditors they would not be needing to show the terms of the individual contracts, such as the amount in question or if there are clauses limiting liability, because these are absolutely irrelevant to their grievance they suffer from and the relief they seek at present. Therefore, the objection by the defendants that there is no common interest to justify a representative action because the contracts are all different is entirely misconceived for being contextually deficient. For the same reason, their reliance on *Markt and Co Limited v The Knight Steamships Company Limited; Sale and Frazar Limited v The Knight Steamships Company*

Limited, is in my view of no assistance given the key distinguishing factor of the difference in the context of the action in the instant case, as correctly argued by the plaintiff.

[63] After all, the object of O 15 r 12 is to avoid multiplication of actions in situations where one action would be able to determine the rights of a number of persons in a question vis a vis a defendant. It would be wholly unnecessary for simultaneous or a succession of proceedings be initiated by different plaintiffs if they have the same interest in the matter. The risk of multiplicity of proceedings with conflicting decisions apart, neither would they constitute a just, expeditious and economical disposal of court actions. It cannot be emphasised enough that O 15 r 12, as are other rules of procedure, are not intended to stultify litigation over a genuine grievance. They are designed to facilitate access to justice.

[64] The plaintiff and the other 27 creditors have thus shown the existence of their common interests as the group of unsecured creditors, that they have a common grievance, for which they are seeking a common beneficial relief. The defendants' contention on whether this class action is validly constituted is thus unsustainable.

WHETHER THE PLAINTIFF MET THE REQUIREMENTS FOR LEAVE

[65] The defendants argue that the plaintiff has failed to show with any particulars what the intended claim against the defendants is or what remedy it seeks against the defendants. The matters complained of, which pertain to events prior to the first creditors' meeting (such as changes in name, structure, shareholding and management of the first defendant company), and those which occurred during and after the creditors' meeting, especially the actions of the second defendant, as well as insinuations of conflict of interest against him are all, so the defendants submit, not actionable per se.

[66] As averred in the affidavit for the defendants, the circumstances leading up to the winding up and the process which followed thereafter had been carried out in accordance with the relevant legal provisions. Thus, the resolution to wind up and appoint a provisional liquidator was passed in accordance with s 254(1)(b) of the CA and the articles of association of the first defendant. The statutory declaration of inability to continue business and the calling of the meetings of the company and of its creditors were made pursuant to s 255(1). The preparation of the statement of affairs as at 8 October 2015 was done in accordance with s 260(4) and proper notice was issued to the plaintiff and the other 27 creditors (as well as other creditors not represented in this action) on the meeting of the creditors and the agenda thereat.

[67] The defendants also submit that to the extent that allegations had been targeted at the matters which transpired at the meeting, the first creditors' meeting itself was convened under s 255(1). Any unhappiness as to how the meeting proceeded does not give rise to any cause of action against the defendants because the meeting was between the creditors themselves. Such allegations of the plaintiff which failed to disclose particulars of claims, the nature of the dispute or remedy against the defendants are thus baseless, frivolous and preposterous in nature which should not justify leave under s 263(2) of the CA.

[68] The defendant further assert that if the intention is to sue the first defendant for payment of debts, such would be adequately dealt with in the winding up process. The plaintiff and the other 27 creditors have in fact even filed their proofs of debt. Further, the case of *Watta Battery Industries Sdn Bhd v Uni-Batt Manufacturing Sdn Bhd (Chow Siew Hon & Ors, interveners)* [1993] 1 MLJ 149; [1993] 1 AMR 344 held that a creditor who has selected one method of having his claim adjudicated on, which gives him the right to question that decision, should not then be in a position to select another method of adjudication.

[69] The action against the second defendant is, according to the defendants, additionally defective because the plaintiff has not shown evidence to support any of its allegation or insinuation against the second liquidator. There is no evidence of personal unfitness or failure to act impartially (for the second defendant was never in control of the creditors' meeting), nor issue on conflict of interest (for insinuation that he had any working relationship with FELDA or its group, being the new effective owner of the first defendant, is entirely baseless and inaccurate), nor on any general principles of conduct of liquidators meriting grounds for removal. Furthermore, the defendants maintain that the adjournment of the first creditors' meeting was wrongful and the second defendant was thus lawfully appointed as the liquidator of the first defendant.

[70] I find little difficulty agreeing with the position taken by the plaintiff that it had, based on the affidavits filed by the three deponents representing the creditors, clearly shown, as I have stated above, that the creditors seek the relief against the defendants in the form of directions from the court concerning the purported appointment of the second defendant at the first creditors' meeting of 2 November 2015, including matters which transpired at the said meeting and in respect of the affairs of the winding up of the first defendant, which had led to the plaintiff and the other creditors to not be supportive of the nomination of the liquidator by the company.

[71] The focus, in essence and substance, is the choice of liquidator, as to whether the second defendant was the lawfully appointed liquidator since the creditors had clearly expressed their wish to nominate one. The basis for the dissatisfaction is the conduct of the first creditors' meeting, in particular the explanation (or lack of) given to the creditors on the background to the affairs leading to the winding up. I think it ought to be stated that the role of the liquidator is absolutely critical to any liquidation process in corporate insolvency. And for the creditors, it is not incorrect to state that the amount of debt they could eventually recover would also be dependent on the appointed liquidator acting independently in the best interest of all stakeholders, the creditors in particular.

[72] Thus their action is not premised on any petty or perfunctory basis. On the contrary, it is premise on the legality of the appointment of the liquidator, which thus strikes at the central foundation of the winding up process in corporate insolvency. Such is the nature of the dispute that clearly cannot be dealt with in the winding up process. Surely it cannot be, as the sine qua non of the liquidation process, which is the lawful appointment of the liquidator is still a live issue that must be resolved first.

[73] There is thus little doubt that the nature of the claim and remedy sought by the plaintiff against the defendants, as made clear by the plaintiff, would clearly not be adequately dealt with in the winding up of the first defendant. This would be entirely in keeping with the decision by the High Court in *Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd* [2005] MLJU 571; [2005] 8 CLJ 652, where Ramly Ali J (as he then was) held instructively thus:

> [1] Leave to proceed pursuant to s 263(2) of the Act would only be granted when it is a question of expedience and convenience: (a) when the plaintiff's claim cannot be adequately dealt with in the winding up of the defendant's company; and (b) when the plaintiff is seeking a remedy which cannot be given in the winding up of the company.

[74] As stated above, an applicant seeking leave under s 263(2) must also show it has a prima facie claim against the respondents. The Court of Appeal in *Mesuntung Property* established that to justify the granting of leave under s 226(3) of the CA an applicant must show both the existence of a prima facie case against the wound up company and that the claim cannot be adequately addressed in the winding up process.

[75] Firstly, I must stress that although the case refers to s 226(3) which concerns the application for leave to commence proceedings against a company wound up by the court, for all intents and purposes, the provision is identical to s 263(2) relevant to the instant case which pertains to a leave application to file an action against a company wound up by its members. The principles

governing the granting of leave in the two situations are the same, as shown in *Shencourt* which considered s 263(2).

[76] Secondly, I am satisfied that the totality of affidavit evidence can only lead to the conclusion that both requirements are satisfied. The dispute concerning the conduct of the meeting, the roles and involvement of the defendants thereat, more especially whether the meeting was validly adjourned, and most critically whether the second defendant was lawfully appointed as the liquidator are in my judgment more that sufficiently justify the finding of the existence of a prima facie claim. I should emphasise the following observations.

ACCOUNTABILITY UNDER SS 260 AND 261

[77] The company is made accountable, vis a vis the proceedings of the creditors' meeting, by having to make available the document and information specified in s 260(4) and (5) and ensure the presence of a director and the company secretary to cause the presentation of the same and answer queries from the creditors. It is thus not quite correct for the defendants to say that the creditors were the ones who conducted and had control of the meeting. The relevant provisions read thus:

> (4) The directors of the company shall —
>
> (a) cause a full statement of the company's affairs showing in respect of assets the method and manner in which the valuation of the assets was arrived at, together with a list of the creditors and the estimated amount of their claims to be laid before the meeting of creditors; and
>
> (b) appoint one of their number to attend the meeting.
>
> (5) The director so appointed and the secretary shall attend the meeting and disclose to the meeting the company's affairs and the circumstances leading up to the proposed winding up.

[78] Firstly, the absence of the company secretary is thus entirely perplexing since it was totally unexplained by the defendants despite the clear statutory requirement. It was made even more disquieting that the affidavit evidence of the three deponents representing the creditors showed that the former company secretary who had only just stepped down in conjunction with the change of the management team upon the takeover about two months prior to the creditors' meeting was actually in attendance at the meeting.

[79] The defendants, who must have reasonably known of her presence amongst the 70 odd creditors and their representatives did not bother to ask whether the creditors wish to listen to her clarification about the affairs of the company, which she of course was entitled not to accommodate.

[80] The fact concerning the script for the proceedings of the meeting per se in my view is not objectionable. It is common secretarial practice to have such script for meetings especially for annual general meetings of companies, for they only guide the chair to ensure smooth order of the proceedings. But what I find a bit disconcerting is that Ms Cindy, who claimed to be a staff of the present company secretary was already referred to in the script, suggesting therefore that her role in the meeting was already anticipated (which is a fair presumption) despite the fact that it fell on a creditor at the meeting (AT) to raise the issue of the absence of the company secretary and compliance of the first defendant with s 260(5) when surely it ought to have been the defendants offering to mention the absence of the company secretary upfront.

[81] To say, as did the second defendant that the present company secretary had been invited but was absent is at best, tenuous as surely the company secretary must be directed by the directors to attend, and an explanation must be in place if attendance is not possible. In any event, the company secretary is also risking personal liability for possible default under s 260(5) in the same way a company secretary may be penalised for non-adherence to other provisions of the CA which impose a direct statutory obligation on the company secretary. Section 260(9) states as follows:

> (10) If default is made in complying with this section the company and any officer of the company who is in default shall be guilty of an offence against this Act.
>
> Penalty: Two thousand ringgit.

[82] Secondly, the disclosure requirements in s 260(4)(a) must be strictly adhered to. In the instant case, as mentioned earlier, the statement of affairs is deficient. The method and manner in which the valuation of the assets was arrived at was not disclosed.

[83] Thirdly, although not specifically mentioned in s 260(4)(a), it is further only to be expected that one or more of the directors should confirm on the statement of affairs of the company, in much the same way, the statement of affairs under Form 17 for winding up by the court is prepared, or as for directors' reports and the audited financial statements, which are also properly signed off by way of statutory declaration by directors before being presented before shareholders in annual general meetings of companies.

[84] Here, the copy extended to the chairman of the meeting by the provisional liquidator was even unsigned. The defendants surely cannot cherry pick and decide to adopt good meeting practice which only benefits them such as having the meeting script for the chairman of the meeting, but not make available the more important document for reference of the creditors in whose interest the meeting was convened in the first place.

[85] As such, in order to make the proceedings of the meeting more effective as well as meaningful, s 260(4)(a) should rightfully also be read as requiring copies of the statement of affairs be made available to the creditors at the meeting, if not made to accompany the notice of meeting earlier. Here, none was made available prior to or at the first creditors' meeting itself.

[86] Fourthly, a report of the company's history up to the date of the commencement of the liquidation should in compliance with s 260(5) be presented to creditors present at the meeting, furnishing in particular an explanation of the reasons for the insolvency. But again, not so in the instant case. Merely stating, like AHA, as the appointed director of the first defendant did, the insolvency as the reason for the liquidation is grossly inadequate as it adds nothing to what is already plainly obvious.

[87] Fifthly, the creditors must be given the opportunity to question the directors of the company or the director appointed to attend the meeting. This I agree, did happen. But to ensure the true exercise of this right and to make practical and meaningful sense of the *raison d'etre* of the convening of a creditors' meeting, surely the director so appointed should properly be one who is well versed with the background, affairs as well as the winding up of the company to be in a position to address such queries from the creditors as prescribed in s 260(4) and (5) referred to above. This did not appear to have been the case at the first creditors' meeting on 2 November 2015.

[88] Whilst I accept that a particular director so appointed may not necessarily be familiar with the facts (which is already rendering him or her an unsuitable choice) to deal with queries, the similar inability of the person tasked by the directors with providing the information to the creditors at the first creditors' meeting on behalf of the directors instead (such was the case with the staff of the second defendant who made the presentation), for he could not answer the pertinent questions about the background and circumstances leading to the winding up, is patently irregular and cannot be accepted.

[89] I note that there is no affidavit from the defendants which credibly disputed the version of the deponents of affidavits for the creditors on what they regarded as the unsatisfactory and lack of responses given to the creditors at the meeting. It is true that the first creditors' meeting was one amongst the creditors. It was even chaired by one of them. Not by AHA, as a director of the first defendant, nor by the second defendant, then the provisional liquidator.

[90] But a creditors' meeting can practically only properly proceed and achieve its objectives of informing the creditors of the matters requiring disclosure (and for the creditors to make the necessary nomination after having heard the explanation) if the first defendant, as the company being liquidated

and the second defendant, being the provisional liquidator play their part in ensuring full observance of the relevant statutory requirements.

[91] Thus, they should ensure the company secretary attend the meeting. They must see to the proper preparation and accuracy and sign-off of the statement of affairs, with copies made available to those in attendance. They must ensure the director appointed by the first defendant company is able to sufficiently share the pertinent information prescribed under s 260(4) and (5) with the creditors at the meeting, and be in a position to provide clarification to creditors, who naturally, faced with a liquidation, would expect if not demand, answers to their queries. If the director so appointed chooses to instead delegate that duty to another representative of the defendants, like what happened in the instant case, that person must then be able to provide the requisite clarification.

[92] I emphasise that it is less to do with whether the creditors are actually satisfied with the answers but much more with whether the answers and clarification are, objectively viewed, acceptable from the professional and business perspective. For example, merely repeating that the purchase of the debt laden first defendant which is then quickly liquidated to be a 'commercial decision', without more, in my view, certainly does not pass muster.

[93] In the instant case it did appear that the first defendant had failed to properly lay down the full statement of the company's affairs and properly disclose to the meeting the company's affairs and circumstances leading up to the proposed winding up.

LIQUIDATOR APPOINTMENT

[94] But the key aspect of the creditors' meeting, one which grants the creditors the right to vote is on the appointment of the liquidator for the creditors' voluntary winding up. Once a provisional liquidator is appointed, his principal duty is to protect the assets of the company until the meeting of creditors at which the liquidator is appointed. At the creditors' meeting, the creditors will vote for the appointment of a liquidator, with the voting being based on the value of creditors' claims. In the event that the creditors' choice of liquidator is different from that of the members, the choice of the former prevails.

[95] Section 261(1) and (2) provides thus:

> (1) The company shall and the creditors may at their respective meetings nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons the person nominated by the

creditors shall be liquidator, and if no person is nominated by the creditors the person nominated by the company shall be liquidator.

(2) Notwithstanding subsection (1) where different persons are nominated any director, member or creditor may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors.

[96] This statutory provision manifests the deference of the law to the choice of liquidator made by the creditors. There may be various reasons why creditors insist on their own nomination, and not being comfortable with the nomination made by the company, chief among which would be the past or existing relationship a liquidator may have with the company, or with its directors and shareholders. This is especially the case if the liquidator chosen by the company has been advising on the company insolvency, raising concerns on whether he would be sufficiently independent to pursue and advance the interests of the unsecured creditors, and at the same time inquire into the propriety of the company antecedent dealings. It is after all often said that the person to be appointed as liquidator must not only be independent of the company but must be seen to be independent (see *Re National Safety Council of Australia, Victorian Division* [1990] VR 29).

[97] The second defendant was asked during the meeting of his relationship with the first defendant. But for the purposes of the instant proceeding, it is unnecessary for me to determine whether the second defendant is independent to perform his function. That is not a question before this court. Nor do I consider it proper in this application for leave proceeding to consider whether this court should consider the removal of the second defendant under s 266 of the CA should leave be granted. The pertinent question is the validity of the appointment of the second defendant in accordance with the relevant statutory provisions. The absence of any evidence of any conflict or other bases of unsuitability of the appointment of the second liquidator as the liquidator as correctly submitted by the plaintiff is irrelevant for present purposes.

[98] The law grants the power of selection to the creditors. Whether or not their reasons for the nomination are justified is of no consequence, provided selection is made of a qualified liquidator. If no nomination is made, the provisional liquidator, by the terms of s 261 becomes the liquidator. It is true, as a matter of fact, that at the first creditors' meeting, no nomination was made by the creditors on their choice as the liquidator of the first defendant company.

[99] But even the draft minutes of the first creditors' meeting prepared by Ms Cindy representing the defendants recorded that firstly, Mr Jason Tan on

behalf of Inovar Contracts Sdn Bhd, a creditor, had asked for an adjournment of the meeting to a later date to give him more time to nominate a liquidator, and secondly, the meeting was eventually adjourned to 16 November 2015 to consider the nomination of liquidator and membership of committee of inspection. Clearly therefore the sense and understanding of everyone at the first creditors' meeting on 2 November 2015 (where none of whom was said to have questioned, let alone objected to the adjournment or the manner the decision had been taken), was that the nomination of the liquidator by the creditors would be made at the adjourned meeting on 16 November 2015.

[100] The defendants, who were seated at the podium or head table directly flanking AT who acted as the chair, did not question the decision to adjourn then. For them to now argue that the adjournment is invalid, resulting in the appointment of the second defendant as liquidator by default (since there was technically no nomination at the first meeting) is in my view bordering on being disingenuous.

[101] The defendants rely on the English case of *Re Centrebind Ltd* [1966] 3 All ER 889; [1967] 1 WLR 377. That case held that prior to the holding of the first creditors' meeting (and despite the statutory requirement that the creditors' meeting should be held on the same day or the day after the meeting of the members, like the position in Malaysia), the member appointed liquidator would have the powers to act as the liquidator of the company. Thus, the liquidator had the power to act from when he was appointed until the creditors' meeting and so could dispose of the company's assets in the meantime.

[102] The defendants thus argued, if I read their submissions correctly, that this is an authority for the proposition that the appointment by the members is already valid and effective until a contrary appointment by a creditors' meeting. Since the adjournment of the first creditors' meeting was argued to be invalid, and there would be no further meeting of the creditors, there is thus no basis to challenge the appointment of the liquidator.

[103] In my view, *Re Centrebind Ltd* does little to advance the contention of the defendants because of the following reasons. First, it is clear that that decision recognises the important point that the appointment by the members is still subject to that of the creditors. The case was noteworthy in holding that the appointment of the liquidator by the members' meeting was already effective, enabling the exercise of the powers of liquidator which did not actually need to be confirmed by the creditors' meeting, although the creditors' meeting, when convened, could override the appointment made by the members. In the instant case, the complaint by the plaintiff is that the creditors' meeting had been adjourned to consider the nomination of a liquidator of their

choice, and pending that, the second defendant had thus not been lawfully appointed.

[104] The stance of the defendants is that there is no adjourned meeting, such that based on the fact that there was no nomination made by the creditors at the meeting on 2 November 2015, the nomination of the members of became effective under the terms of s 261(1) of the CA. In this sense, *Re Centrebind Ltd* does not add anything to the position taken by the defendants in view of s 261(1), because their central argument is the second defendant became the liquidator given the operation of s 261(1).

[105] Secondly, *Re Centrebind Ltd* had, in England, given rise to a legal device known, perhaps aptly as 'centre-binding' which put a company into liquidation more than one day before the creditors' meeting (despite not adhering to the then law), in order to try to prevent a creditor from exercising a right of distraint over company assets. This loophole was later abused in cases where before the creditors' meeting, the liquidator already had the power following appointment by the members, sold the business to a new company, often owned by the management of the first company, without the debts of the old company.

[106] In other words, 'centre-binding' allowed a company to deliberately delay the holding of the first creditors' meeting and, with the assistance of the members-appointed liquidator engages in acts to the detriment of the creditors' interests, such as by selling the assets of the company at a knock-down price to a purchaser closely connected with the company or the directors.

[107] The UK Insolvency Act 1986 then revamped the law and gave a limited statutory recognition to 'centre-binding' in the sense that it was thought that there may be certain situations that a liquidator ought to be appointed immediately before the convening of the first creditors' meeting. Thus, although a company now has a 14 day-period to call for a creditors' meeting after the members' meeting is convened (the corresponding provision in Malaysia in s 260(1) remains to be not beyond one day after), liquidators can no longer exercise their powers before the holding of a creditors' meeting without court sanction.

[108] Additionally the Insolvency Act 1986 introduced the requirement that liquidators be of a professional standing and this has the effect of dampening the extent to which a liquidator can co-operate in transferring the insolvent business to a connected party, without the full scrutiny of the creditors. However, under the Insolvency Act 1986, the liquidator may exercise his powers to take into his custody the property of the company, dispose of perishable goods and other goods the value of which is likely to diminish if not

immediately disposed of or do all things necessary for the protection of the company's assets without the need to seek the court's sanction.

[109] Thus the ratio in *Re Centrebind Ltd* cannot be fully relied on for the simple reason that the law in England has since been changed in at least two aspects when compared with the Malaysian CA. First, the time period to convene the creditors' meeting has been extended to not more than 14 days from the meeting of the members. Secondly, the exercise of the key powers of the liquidator has in any event, been constrained by the requirement for prior sanction of the court. Accordingly, little can be relevantly drawn from that decision to the instant case.

[110] Thirdly, as pointed out by the defendants themselves in their written submissions, *Re Centrebind Ltd* was not followed in the case of *Re Kyra Nominees Pty Ltd* (1980) 5 ACLR 60. The latter upholds the principle which I reiterate similarly obtains in Malaysia, that the choice of the liquidator to be appointed in a creditors' voluntary winding up is resolutely one which the law vests in the creditors.

[111] In *Re Centrebind Ltd*, that important right of the creditors was only qualified to the extent of allowing the appointment of liquidators by the members to take effect immediately; but still subject to any subsequent contrary nomination at a creditors' meeting that must be convened (the powers of the members-appointed liquidator have now, as stated, given the Insolvency Act 1986 in any event been diluted by the requirement for that liquidator to obtain court sanction).

[112] Thus in *Re Kyra Nominees Pty Ltd,* the company's proceeding on a members' voluntary winding up with their liquidator appointed pursuant to s 258 of the Companies Act 1961 (Western Australia) (in pari materia with s 258 of the Malaysian Companies Act 1965) was ruled by the Supreme Court of Western Australia as a creditors' voluntary winding up instead in the absence of a declaration of solvency under s 257 of the Australian legislation (equivalent to our s 257).

[113] Given that it was, under the law, a creditors' voluntary winding up, it was not open to the members to appoint a liquidator under s 258. Pidgeon AJ held that even though in *Re Centrebind Ltd* the liquidator appointed by the members in a creditors' voluntary winding up could act as liquidator for very limited purposes, and could continue until a contrary appointment by the creditors, the same 'should not be followed when interpreting the Companies Act 1961', because the only way a liquidator can be appointed in a creditors' winding up is under s 261 (identical to our s 261 referred to above).

[114] The following passage from the judgment of Pidgeon AJ in *Re Kyra Nominees Pty Ltd*, which clearly reiterates the long standing principle on the superiority of the nomination of liquidators made by the creditors' meeting, and which continues to apply in Malaysia under the CA, is self-explanatory:

> ... the members of the company had power to nominate a liquidator but he could only be appointed and act as liquidator in the event of the creditors not making a different nomination. A person nominated by a company at a creditors' winding up could not in my view act prior to the creditors' meeting as he is no more than a nominee.

[115] Fourthly, it is worthy of emphasis that as correctly highlighted by the plaintiff, *Re Centrebind Ltd*, in the judgment of Plowman J had stated in effect that the decision in that case that the liquidator nominated by the members is the liquidator of the company even before the meeting of the creditors, is still subject to any subsequent decision of the creditors who could decide to make a different appointment, even though the prior appointment and act of the liquidator appointed by the members' meeting was valid. For completeness, the relevant part of the judgment is reproduced hereunder:

> I take the view that where a meeting of the members has nominated or appointed a liquidator and no meeting of the creditors had been held, nevertheless until something is done about it at the instance of the creditors, the person nominated or appointed as liquidator by the members at their meeting is the liquidator of the company

[116] In the instant case, the creditors had indeed 'done something' by putting the defendants on notice during and after the first creditors' meeting of the intended course of action of the creditors to make a nomination of a liquidator at the adjourned meeting which did not however officially take place.

[117] Accordingly, I fail to see in what manner *Re Centrebind Ltd* could assist the defendants. In my view, it has the reverse repercussions on, and further weakens the position of the defendants.

MEETING ADJOURNMENT

[118] In respect of the stance of the defendants concerning the validity of the decision to schedule an adjourned meeting of the creditors on 16 November 2015, rr 119 and 122 in the first place do not stipulate that a motion for adjournment must be presented in a positively worded manner. Rule 122 expressly allows adjournment of creditors' meetings, provided the consent of the meeting is obtained. It reads as follows:

> The chairman may with the consent of the meeting adjourn it from time to time and from place to place in Form 70, but the adjourned meeting shall be held at the

same place as the original place of meeting unless in the resolution for adjournment another place is specified or unless the Court otherwise orders.

[119] Rule 119 deals with how resolution ought to be taken as being passed. It states thus:

> At a meeting of creditors or contributories a resolution shall be deemed to be passed when a majority in number and value of the creditors or, as the case may be, contributories present, personally or by proxy, and voting on the resolution, have voted in favour of the resolution, the value of the contributories being determined according to the number of votes conferred on each contributory by the regulations of the company.

[120] It is incumbent upon the chairman of the meeting to be satisfied that to be able to adjourn, the consent of a majority in value and number of the creditors has been obtained. This can be easily obtained by voting by poll. However in this case the process could take time to validate, as in fact encountered when a poll was taken to decide whether or not to continue the meeting in the absence of the company secretary. Further the chairman took the view that since it had at that juncture at 2.30pm way passed lunch time, it would no longer be conducive to prolong the proceedings. In any event r 119 does not state that any resolution, let alone one for an adjournment, must be done by way of poll either.

[121] The results of that earlier voting by poll, which disclosed the value attributed to individual creditors who were present at the meeting was also the basis used by the chairman to satisfy himself on the requisite consent for the adjournment. This is because, although the chairman asked the pertinent question on whether the meeting ought to be adjourned in the negative — merely whether there was any objection to the adjournment (which admittedly is not exactly the recommended practice of presenting a motion for any resolution), the objection raised by only the five Encorp Group related creditors was, as correctly argued by the plaintiff, easily and readily determined, based on information already available on the value of liabilities attributed to the five, to have represented a minority in both value and number of creditors. Thus the majority in value and number of the creditors at the meeting could rightly be said to have consented to the adjournment.

[122] Most importantly, even if the above construction of r 119 is erroneous, the decision of the chairman to adjourn on the basis he relied on would readily attract the application of r 194(1) of the Companies (Winding-up) Rules 1972 which provides the following:

A (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

B **[123]** As mentioned earlier, the meeting was adjourned on the basis of the understanding that the nomination of the liquidator by the creditors would be done at the adjourned meeting. Post-meeting, Mr Jason Tan of Inovar Contracts Sdn Bhd even further followed up with the letter to the second defendant confirming he would make the nomination at the adjourned C meeting. There is no evidence of any complaints from any creditors about the adjournment during or even after the decision taken to adjourn. As stated earlier in the judgment, the creditors dutifully made the effort to attend the adjourned meeting. No preparation was made by the defendants for the same and neither did any of them bother to turn up if only to explain to the creditors D their position on the matter. There was after all no notice given by the defendants to the creditors about the alleged invalidity of the adjournment, thus leaving the clarification be done by AT. AT however then understandably declined to chair at this adjourned meeting to avoid further complication given the challenge by the defendants of AT's decision to adjourn the first creditors' E meeting. One Mr Liow Si Khoon was then elected as the chairman of this meeting, which as mentioned earlier, did not proceed.

[124] Only the defendants complained about the adjournment, conveniently F after the event, but they have not demonstrated in what fashion the adjournment had occasioned any form of injustice to them, let alone substantial in nature. Or to any other parties for that matter. On the other hand, to hold the adjournment invalid and that the second defendant would as a consequence be appointed as liquidator by default would cause substantial G injustice of a nature that could not legitimately be remedied by the curative provision of r 194 for the same would, in substance and effect, constitute a flagrant repudiation of the statutory right of the creditors to nominate a liquidator of their choice as firmly enshrined in s 261(1) of the CA, since notice of the exercise of such right had been made at a lawfully convened first creditor H meeting of 2 November 2015.

[125] Given that the second liquidator could well have not been validly appointed in view of the pendency of the nomination of the liquidator by the I creditors which was supposedly to have been made at the adjourned meeting on 16 November 2015, the second defendant status could well remain as the provisional liquidator, in accordance with the provision of s 255(3) of the CA which states thus:

The appointment of a provisional liquidator under this section shall continue for one month from the date of his appointment or for such further period as the Official Receiver may allow in any particular case or until the appointment of a liquidator (whichever first occurs).

KEY INTEREST OF CREDITORS IN CREDITORS VOLUNTARY WINDING UP

[126] A creditors' voluntary winding up is a procedure initiated by a company directly, to voluntarily bring the business to an end, and for that purpose appoint a liquidator to liquidate all its assets. It is not, despite the name, commenced by the creditors. In essence, if directors of a company cannot sign on a declaration of solvency when considering a members' voluntary winding up, the company ought to rightfully proceed, like the first defendant in the instant case, with a creditors' winding up.

[127] In my view, it certainly cannot be emphasised enough that the mechanism and process governing a creditors' voluntary winding up or creditors' voluntary liquidation ('CVL') is enacted to protect exactly what it says — the creditors' rights in liquidation, and for that reason the interests of the creditors, collectively, are decidedly at the forefront during this process, for the overarching objective is after all the realisation of company assets and payment of dividend to the creditors.

[128] The various provisions which I have discussed earlier in this judgment are all intended to ensure the CVL process proceeds in a fashion that is not detrimental to the interests of the creditors. The decision to liquidate is for the members to make, and the only powers available to the creditors are those related to the supervision of the liquidation exercise. And the starting but key point is the power to nominate the liquidator for that process, at the first meeting of the creditors.

[129] In the instant case, the debts due and owing to the unsecured creditors of the first defendant recorded and announced during the first creditors' meeting was over RM91m, in comparison with the realisable assets of the company which was stated to be only about RM19m.

[130] In any CVL, it may thus be stated that creditors should justifiably therefore be entitled to expect not only the strict adherence by the company to the applicable legislative prescriptions in among others, ss 260 and 261 of the CA, but also to the general principles of fairness and commercial morality which underlie the details of corporate insolvency law. I am in no doubt that this principle as enunciated by Hoffmann J in *Re Palmer Marine Surveys Ltd* [1986] BCLC 106; [1986] 1 WLR 573 is similarly applicable to, and forms

the foundation of the insolvency laws in this country, such that any legitimate sense of injustice held by a creditor should deserve a proper address by the court.

[131] On the basis of the foregoing I find that the balance of convenience lies overwhelmingly in favour of the plaintiff to pursue its claim against the defendants for the necessary directions on the appointment of liquidator and the affairs concerning the winding up of the first defendant. It is not, in the instant case, a question of two alternative procedures — either by court action to judgment or by lodging a proof of debt with the liquidator. That is not the choice faced by the plaintiff and the other creditors. They have no complaints submitting to the proofs of debt process. They have filed theirs, as stated earlier.

[132] At the risk of repetition, their core challenge is a most fundamental one, which is on the validity of the appointment of the second defendant as liquidator arising from the first creditors' meeting. It appears to me that once that issue is resolved, and the process of validating proofs of debt be properly carried out by the liquidator lawfully appointed, the creditors would then accordingly participate in that process fully.

[133] I thus find that the action sought to be commenced by the plaintiff concerns a real dispute which is not futile and involves serious questions, more so instituted as a representative action for 28 unsecured creditors in total, and that it would not impede an orderly winding up, nor unnecessarily carry the risk that the fund of company assets available to the creditors will be depleted by costs nor cause prejudice to other creditors (see *JJ Leonard Properties Pty Ltd v Leonard (WA) Pty Ltd (in liq)* (1986) 11 ACLR 224).

CONCLUSION

[134] The court would not as a matter of principle, ordinarily readily interfere with the exercise of the duties of a liquidator, being an officer of the court, in his administration of the process of the liquidation. This is also to ensure that the limited resources of the company are not unduly exhausted, to the detriment of the interests of the creditors. In the instant case, the claim is intended to be instituted by a plaintiff on behalf of 28 unsecured creditors, in whose interest CVL provisions are enacted in the first place, and is grounded on the challenge against the validity of the purported appointment of the second defendant, and the roles played by both defendants in connection with the first creditors' meeting of 2 November 2015. The issue of the due and proper appointment of the liquidator for the first defendant is one which is deserving of the requisite leave to be granted, to allow the plaintiff to commence action in the best interest of all the creditors and contributories of the first defendant, including the group of unsecured creditors whom the plaintiff represents.

[135] I have set out in the foregoing the reasons for my findings which considered the plaintiff to be deserving of leave under s 263(2) of the CA to pursue legal proceedings against a wound up company, since it has been manifestly shown that the plaintiff has a prima facie case of real dispute and that the nature of its claim and the remedy that is being sought in the intended suit cannot be dealt with in the winding up process. The plaintiff has thus demonstrated satisfaction of both requirements for leave as established by case law authorities. Accordingly, I allow this application for leave under s 263(2) of the CA for the plaintiff.

Plaintiff's application for leave allowed.

Reported by Kohila Nesan